A

Cheah Chee Fong v Yah Kem Chui & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCC)-1127–06 OF 2021
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
13 OCTOBER 2022

C

Companies and Corporations — Winding up — Petition — High Court dismissed appellant's winding up petition against second respondent — Appellant appealed against decision of High Court — Whether High Court judge erred in dismissing petition — Whether second respondent should be wound up — Companies Act 2016 s 465(1)(f) & (h)

D

This was an appeal against the whole of the decision of the learned High Court judge ('LJ') in dismissing the appellant's petition to wind up the second respondent company ('R2'). The appellant and the first respondent ('R1') met when they were consultants in a high-rise development project. The appellant's expertise was in civil and structural work while R1's expertise was in geotechnical and foundation work. The appellant and R1 had discussions with a view to working together and both of them concluded that it would be ideal if they were to combine their expertise and set up a practice that provides integrated geotechnical, civil and structural consultancy services. As a result of the discussions, R2 was incorporated. Ten years after the incorporation of R2, R1 incorporated a sole proprietorship, GC Consulting ('GC') that engaged in business that was in direct competition with R2's business. Many issues arose between the parties that led to the breakdown of the relationship of trust and confidence between them. The appellant believed that the relationship between the parties had reached a deadlock and there was no prospect of the deadlock being broken. The appellant filed a petition for a winding up order against R2 pursuant to s 465(1)(f) and/or (h) of the Companies Act 2016. The appellant contended that R2 should be wound up on the basis that R1 had acted in his own interest rather than in the interests of the members as a whole or acted in any other manner which appeared to be unfair or unjust to members and that it was just and equitable that R2 be wound up. The petition was dismissed and hence this appeal.

E

F

G

H

I

Held:

(1) The circumstances alluded to had affected the trust and confidence that the appellant had in R1 and their relationship as partners for more than 20 years sharing a common pursuit. The incidents had caused an

irretrievable breakdown of trust and confidence between the only two directors-cum-shareholders with equal shareholding and a complete functional deadlock in the management of R2. It was a plain error on the part of the LJ to judicially appreciate the glaring fact that the appellant could not reasonably be expected to continue working with R1 thenceforth. The LJ had not sufficiently appreciated and analysed the facts objectively in arriving at an incorrect conclusion that it was not just and equitable to wind up R2. The evidence was overwhelming and convincing that R1 had acted in his own interest to further the business interests of his own company, GC, and placed himself indisputably in a conflict of interest position to the detriment of R1. The LJ's conclusion that the acrimonious disputes between the only shareholders had been amicably resolved and there did not exist any communication deadlock between them was plainly misconceived and unsupported by the undisputed facts and the events that unfolded preceding the winding up petition (see paras 36–40).

(2) This was a fit and proper case for R2 to be wound up under s 465(1)(f) and (h) and therefore an order in terms of prayers (a), (b) and (c) of the petition was granted (see para 42).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keseluruhan keputusan hakim Mahkamah Tinggi ('HMT') yang bijaksana dalam menolak petisyen perayu untuk menggulung syarikat responden kedua ('R2'). Perayu dan responden pertama ('R1') bertemu semasa mereka menjadi perunding dalam projek pembangunan bertingkat tinggi. Kepakaran perayu adalah dalam kerja sivil dan struktur manakala kepakaran R1 adalah dalam kerja geoteknikal dan asas. Perayu dan R1 mengadakan perbincangan dengan tujuan untuk bekerjasama dan kedua-dua mereka membuat kesimpulan bahawa adalah sesuai jika mereka menggabungkan kepakaran mereka dan menubuhkan satu amalan yang menyediakan perkhidmatan perundingan geoteknikal, awam dan struktur bersepadu. Hasil daripada perbincangan, R2 telah diperbadankan. Sepuluh tahun selepas pemerbadanan R2, R1 memperbadankan milikan tunggal, GC Consulting ('GC') yang terlibat dalam perniagaan yang bersaing secara langsung dengan perniagaan R2. Banyak isu yang timbul antara pihak-pihak yang membawa kepada keretakan hubungan kepercayaan dan keyakinan antara mereka. Perayu percaya bahawa hubungan antara pihak-pihak telah mencapai jalan buntu dan tidak ada prospek kebuntuan diatasi. Perayu memfailkan petisyen untuk perintah penggulungan terhadap R2 menurut s 465(1)(f) dan/atau (h) Akta Syarikat 2016. Perayu berhujah bahawa R2 harus digulung atas dasar bahawa R1 telah bertindak untuk kepentingannya sendiri dan bukannya untuk kepentingan ahli secara keseluruhan atau bertindak dalam apa-apa cara lain yang kelihatan tidak adil atau tidak saksama kepada

ahli dan adalah adil dan saksama bahawa R2 digulung. Petisyen telah ditolak dan oleh itu rayuan ini.

Diputuskan:

(1) Keadaan yang dimaksudkan telah menjejaskan kepercayaan dan keyakinan perayu terhadap R1 dan hubungan mereka sebagai rakan kongsi selama lebih daripada 20 tahun berkongsi usaha yang sama. Insiden tersebut telah menyebabkan keruntuhan kepercayaan dan keyakinan yang tidak dapat dipulihkan antara dua pengarah dan pemegang saham yang mempunyai pegangan saham yang sama dan kebuntuan sepenuhnya dalam pengurusan R2. Ia adalah satu kesilapan nyata di pihak HMT untuk menghargai fakta yang jelas bahawa perayu tidak boleh dijangka terus bekerja dengan R1 sejak itu. HMT tidak cukup menghargai dan menganalisis fakta secara objektif dalam membuat kesimpulan yang salah bahawa tidak adil dan saksama untuk menggulung R2. Keterangan amat memberangsangkan dan meyakinkan bahawa R1 telah bertindak demi kepentingannya sendiri untuk memajukan kepentingan perniagaan syarikatnya sendiri, GC, dan meletakkan dirinya dalam kedudukan konflik kepentingan yang merugikan R1. Kesimpulan HMT bahawa pertikaian sengit antara pemegang saham telah diselesaikan secara baik dan tidak wujud apa-apa kebuntuan komunikasi antara mereka jelas salah faham dan tidak disokong oleh fakta yang tidak dipertikaikan dan peristiwa yang berlaku sebelum petisyen penggulungan (lihat perenggan 36–40).

(2) Ini adalah kes yang sesuai dan wajar untuk R2 digulung di bawah s 465(1)(f) dan (h) dan oleh itu perintah seperti dipohon menurut terma (a), (b) dan (c) petisyen telah diberikan (lihat perenggan 42).]

Cases referred to

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209, SC (refd)

Ebrahimi v Westbourne Galleries Ltd and others [1972] 2 All ER 492, HL (refd)

Lau v Chu [2020] 1 WLR 4656, PC (folld)

Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1, FC (refd)

Suki Mee v Far Origin Sdn Bhd [2020] MLJU 1408, CA (refd)

Varusay Mohamed Shaik Abdul Rahman v Svk Patchee Bros (M) Sdn Bhd [2002] 3 MLJ 674; [2002] 3 CLJ 741, CA (refd)

Legislation referred to

Companies Act 2016 ss 218(1)(e), 465, 465(1), (1)(f), (1)(h)

Appeal from: Company (Winding Up) No BA-28NCC-321–07 of 2020 (High Court, Shah Alam)

Khoo Guan Huat (with Karen Tan Wee Sean) (Skrine) for the appellant.
Ou Yong Koh Beng (KB Ou Yong & Co) for the first respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] The appellant's appeal herein is against the whole of the decision of the learned High Court judge ('LJ') given at the Shah Alam High Court ('SAHC') where the LJ dismissed the appellant's petition to wind up the second respondent company ('R2') pursuant to s 465(1)(f) and (h) of the Companies Act 2016 ('the CA 2016').

[2] As summarised for our easy reference by the appellant, his challenge against the LJ's decision consists of two parts: the first part being that the appeal should be allowed on two grounds; and the second part being that the LJ had erred in applying four wrong grounds in dismissing the instant petition.

[3] In regard to the first part, the two grounds relied upon are as follows:

(a) R2 should be wound up on the just and equitable ground under s 465(1)(h) of the CA 2016; and

(b) the first respondent ('R1') had acted in his own interest rather than the interest of the R2 as a whole ('first limb') or acted in any other manner which appears to be unfair or unjust to members ('second limb') (under s 465(1)(f) of the CA 2016).

FACTUAL BACKGROUND

[4] The appellant/petitioner and R1 met when they were consultants in a high-rise development project. The petitioner's expertise was in civil and structural work while the first respondent's expertise was in geotechnical and foundation work.

[5] In 2000, the appellant and R1 had discussions with a view to working together and both of them concluded that it would be ideal if they were to combine their expertise and set up a practice that provides integrated geotechnical, civil and structural consultancy services

[6] As a result of discussions, R2 was incorporated in 25 February 2002. The nature of business of R2 is engineering consultancy. A

[7] At the material time, the appellant was aware that R1, was the Managing Director of Geo Management Sdn Bhd ('GMSB') which provides Geotechnical and Foundation Consultancy. R2 and GMSB share a similar business address and R2 pays rental to GMSB in respect of a lease for part of the first and second floors of a three-storey building owned by GMSB and R1. B

[8] The appellant and R1 are aware of the potential conflict of interest between R2 and GMSB in respect of geotechnical and foundation consultancy work, thus, they agreed as follows: C

(a) if the appellant sourced any geotechnical and structural work, that work will be carried out by R2;

(b) if R1 sourced any work that involved civil, structural, geotechnical and foundation consultancy, that work will be carried out by R2; and D

(c) if the R1 secured only geotechnical and foundation consultancy, that work will be carried out by GMSB. E

[9] Many issues arose between the parties that led to the breakdown of the relationship of trust and confidence between them. The appellant believed that the relationship between the parties had reached a deadlock and there was no prospect of the deadlock being broken. F

[10] On 8 July 2020, the appellant filed a petition for a winding up order against R2 pursuant to s 465(1)(f) and/or (h) of the Companies Act 2016.

[11] The appellant contended that R2 should be wound up on the basis that R1 had acted in his own interest rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members and that it is just and equitable that R2 be wound up. G

[12] On 24 May 2021, the High court dismissed the petitioner's petition with costs of RM3,000. H

[13] The High court decided that it was not just and equitable to wind up R2 on the following grounds: I

(a) there was no breakdown in trust and confidence between the appellant and the first respondent as the disagreements that arose between the parties had been resolved by the parties;

(b) there was no actual deadlock in the management as the appellant has knowledge of the second respondent's operations and is involved in the management of the second respondent;

(c) it would cause great injustice to the second respondent as there are still on-going works to be completed by the second respondent;

(d) the petitioner and the first respondent still run the operation of the second respondent together by bringing in new projects and handling letters of offer for the second respondent's appointment by the customers; and

(e) the appellant has failed to prove that the first respondent has acted in his own interest rather than in the interests of the second respondent as a whole.

OUR ANALYSIS AND DECISION

[14] In relation to both the core grounds of appeal, the thrust of the appellant's case was that R1 had placed himself in a blatant conflict of interest position by engaging in businesses and/or projects that were in direct competition with the primary business activity of R2. It was contended that as R1 had acted in his own interest rather than that in the interests of the members of the company as a whole or had acted in a manner that appeared to be unfair or unjust to the members, it was just and equitable that R2 ought to be wound up pursuant to s 465(1) of the CA 2016.

[15] The issues that arose for determination before the court below as summarised in the LJ's grounds of judgment are as follows:

(a) whether the first respondent had acted in the first respondent's own interest rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members? and

(b) whether the second respondent should be wound up?

[16] For convenience, we reproduce the relevant parts of s 465 of the CA under which the appellant commenced the winding up ('W/U') petition against R2, as follows:

(a) s 465(1)(f) of the Companies Act 2016 states:

> 465(1) The courts may order the winding up if —
>
> (f) the directors have acted in the affairs of the company in the directors' own interest rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members;

(b) s 465(1)(h) of the Companies Act 2016 states:

465(1) The court may order the winding up if —

(h) the court is of the opinion that it is just and equitable that the company be wound up;

[17] We would first deliberate on the principle applicable to the just and equitable ground invoked by the appellant in support of the first ground of appeal. Reference was made by the LJ to the elaborated in the case of *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492, where it was explained, amongst others, that:

> ... the words 'just and equitable' ... enable the courts to subject the exercise of legal right to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way ...

[18] The appellant rightly brought to our attention several relevant authorities in point in Malaysia and other jurisdictions where a winding up order was granted on the just and equitable ground. For our purpose, we would refer to the following leading authorities as summarised by the appellant. In the Malaysian Federal Court case or *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1 ('Perak Integrated'), the plaintiff and the second defendant were the only two shareholders of the first defendant company, each holding 50% of the shares. The Federal Court held that there was a deadlock in the company as the board of the company was equally split between directors with opposing views (see paras 58, 75–77 to 82 of the judgment).

[19] In the Court of Appeal case of *Varusay Mohamed Shaik Abdul Rahman v Svk Patchee Bros (M) Sdn Bhd* [2002] 3 MLJ 674; [2002] 3 CLJ 741, the alleged grievances by the petitioner who petitioned to wind up the company on the just and equitable ground were, amongst others, a rival business was set up by the managing director of the company and the petitioner/appellant was excluded from participating in the management of the company. The Court of Appeal allowed the petitioner's appeal to wind up the company (see pp 744C, 747A-C, 748F-H and 749E and to 750A-B of the judgment).

[20] Where there is a functional deadlock in the management of the company concerned and an irretrievable breakdown in trust and confidence between the only shareholders it would be sufficient ground to order winding up of the company. See Privy Council case of *Lau v Chu* [2020] 1 WLR 4656. Our view is that this settled principle ought to be applied to the instant facts to determine the central question in this appeal whether the LJ had erred in failing to judicially appreciate the undisputed facts before him and applied settled

principles to the present facts in dismissing the petition for winding up of R2.

[21] We would proceed to scrutinise the reasons given by the LJ for concluding that the just and equitable ground had not been established under the grounds and circumstances advanced in the petition. Emphasis was given to the fact that the appellant had made an offer for R1 to buy over his shares in R2 but R1 had rejected the offer because R2 was still solvent and able to carry out its daily operations as usual. Mere rejection of the share buy-out could not be, on the LJ's view, a sufficient basis to wind up R2. It was just no more than dissatisfaction on the appellant's part that did not justify the drastic action of winding up the company.

[22] Secondly, the LJ's view was that there was no actual deadlock in the management of R2 as, amongst others, the appellant had knowledge of its operations and had participated in the management of R2 together with R1. Both of them ran the operations and brought in new projects Importantly, the LJ made a finding that R2 had acted in the best interests of the company contrary to what the appellant had alleged. A winding up order would result in grave injustice to the company as there are still ongoing uncompleted projects Also that, notwithstanding the appellant's dissatisfaction and some miscommunication between the two shareholders, all the pressing existing issues had in fact been resolved.

[23] The principal question that arose for our determination was whether the LJ had made an incorrect finding that it had not been proved that R1 had acted in his own interests to the detriment of the interests of R2 which would justify the company being wound up premised on the just and equitable ground.

[24] It bears reiterating that a company may be wound up if the directors are shown to have acted in their own interests in managing the affairs of the company that appears to be unfair or unjust to members (s 465(1)(f) of the CA). This ground is linked to the averment that R1 had placed himself in a conflict of interest position when he engaged in a business that was directly in competition with R1's primary business The answer to this question would depend on the conduct of the directors and the circumstances in which the petitioner is placed as the only other shareholder cum director in relation to the affairs of the company (see *Suki Mee v Far Origin Sdn Bhd* [2020] MLJU 1408 (COA)).

[25] Of foremost importance in deciding the issue at hand is s 218(1)(e) of the CA which provides that a director of a company shall not without the consent or ratification of a general meeting engage in business, which is in competition with the company, to gain directly or indirectly a benefit for

himself or any other person, or cause detriment to the company.

[26] It is settled principle of company law that directors as fiduciaries must not place themselves in a position in which there is a conflict between their duties to the company and their personal interests or duties to the others. One of the most obvious examples of a situations which gives rise to a conflict between a director's interest and his duties is where he carries on or is associated with a business competing with that of the company (see the textbook *Gower's Principle of Modern Company Law* (2007)).

[27] Where directors put themselves in conflict of interest positions by engaging in rival business, it amounts to breach of the fiduciary duties (see *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209).

[28] It was the appellant's contention that both the limbs of s 465(1)(f) of the CA 2016 had been satisfied to support the winding up petition.

[29] In respect of the first limb, the appellant relied on these facts:

(a) that R1 had formed a separate entity, GC Consulting ('GC') that engaged in business that was in direct competition with R2's business; and

(b) R1 diverted business to his own company, GC, instead of to R2.

[30] We now deal with the material facts in relation to the above allegations.

[31] As to the competing business ventured into by R1, it was ten years after the incorporation of R2 when he incorporated a sole proprietorship ('GC'). The latter's nature of business was substantially similar to the nature of business of R2 which is to provide geological and foundation surveying services, consultancy services, engineering services and technical architecture services GC shared a same business address as R2.

[32] The allegation that R1 had participated in competing businesses against the interests of R2 arose from two projects of substantial value: the KLIA 2 Project ('K2P') and the Taman Wahyu Project ('TWP').

[33] In respect of K2P, the LJ accepted that R1 had been engaged by the main contractor as a Geotechnical Consultant for the design of the control tower through his company GMSB. R1 had utilised the services of R2's engineer only for the purpose of relocating the control tower on the main contractor's instruction as it involved the job scope of R2. When confronted by

R1 on this move, R1 had paid RM250,000 to R2 from the former's fee. Hence, the LJ deemed the dispute to have been resolved.

[34] Moving on to the TWP project, the LJ took into account that both GMSB and R.1 had submitted proposals for its infrastructure works wherein in GMSB's proposal R.1 had sent a letter to the developer on the division of work: all geotechnical aspects involved in the project would be handled by GMSB whereas R2 will only cover the remaining civil and infrastructure work. The appointment of GMSB as the Geotechnical Consultant and not R2 had caused dissatisfaction to the appellant. However, the LJ found that this did not result in conflict of interest by R1 as he had acknowledged that the R2 will cover the remaining civil and infrastructure work involved in the project excluding the geotechnical elements in the event that GMSB was appointed by the developer. Again, the LJ found that the issue was resolved between the parties.

[35] While we acknowledge that the infrastructure consultancy work tendered by R2 for the TWP may be different from the Geotechnical and Foundation Consultancy work tendered for by R1 through his company, GC, the surrounding facts as highlighted by the appellant merit our consideration. Amongst others, the appellant had via WhatsApp communication on 16 October 2016 protested against R1's involvement in the project and requested for a discussion but it did not elicit any response or denial by R1. Neither had R1 paid any attention to the protests and complaints regarding R1's participation in the project. Despite the issue of R1's conflict of interest having been raised, GC persisted in submitting its proposals on two occasions to the developer signed by R1 as a director of GC. Importantly too R1 in GC's letter of proposal to the developer had referred to R2 as 'our associate company ...' which was shown to be obviously untrue. The agreed professional fee for R2 as the Civil and Structural Engineer for TWP was RM310,000 whereas that of GC as the Geotechnical Consulting Engineer in contrast was RM885,000.

[36] From our scrutiny of the facts and evidence relating to the two projects above, in particular the conduct of R1 in seeking to bid for projects through his own company ('GC') where proposals were also submitted by R2, we are inclined to agree with the appellant's position that the circumstances alluded to have affected the trust and confidence that the appellant had in R1 and their relationship as partners for more than 20 years sharing a common pursuit.

[37] Our attention was drawn to several incidents that occurred between the appellant and R1 in the management of R2. It was emphasised that the incidents clearly manifested the deterioration in their relationship such that it had become impossible for the appellant to continue working with R1 in managing R2. Without the necessity of having to delve into the details of

various acrimonious incidents, we agree with the appellant that in gist, these incidents had caused an irretrievable breakdown of trust and confidence between the only two directors-cum-shareholders with equal shareholding and a complete functional deadlock in the management of R2.

[38] Our view is that it was a plain error on the part of the LJ to judicially appreciate this glaring fact that the appellant could not reasonably be expected to continue working with R1 thenceforth.

[39] In our judgement, the LJ that had not sufficiently appreciated and analysed the facts objectively in arriving at an incorrect conclusion that it was not just and equitable to wind up R2 on the following grounds:

(a) There was no breakdown in trust and confidence between the appellant and R1 as the disagreements that arose between the parties had been resolved by the parties;

(b) There was no actual deadlock in the management as the appellant had knowledge of R2's operations and was involved in the management of R2;

(c) It would cause great injustice to R2 as there are still on-going works to be completed by R2; and

(d) The appellant has failed to prove that R1 has acted in his own interest rather than in the interests of R2 as a whole.

[40] We would emphasise that the evidence was overwhelming and convincing that R1 had acted in his own interest to further the business interests of his own company, GC, and placed himself indisputably in a conflict of interest position to the detriment of R1. To conclude that the relationship of trust and confidence between R1 and R2 that was necessary to sustain the company's management remained intact despite R1's conduct was wholly unreasonable. Likewise, the LJ's conclusion that the acrimonious disputes between the only shareholders had been amicably resolved and there did not exist any communication deadlock between them was plainly misconceived and unsupported by the undisputed facts and the events that unfolded preceding the winding up petition.

CONCLUSION

[41] On the foregoing grounds, we are inclined to conclude that the LJ's decision to hold that the winding up petition had no basis and should be dismissed on the grounds advanced by the appellant, the most important being the just and equitable ground, was plainly wrong and warranted appellate intervention.

[42] The following was our decision at the conclusion of the present appeal:

(a) we find merits in the appeal. There is a breakdown of mutual trust and confidence in the light of all that had happened which the learned judge had not fully appreciated. There were the KLIA 2 project and the Taman Wahyu project where the former was resolved after respondent 1 had been confronted by the petitioner. The Taman Wahyu project has not been resolved to date;

(b) the parties are not communicating with each other to the extent that statutory meetings are not held and that important decisions were made unilaterally by respondent 1;

(c) whilst there are still projects ongoing they are mainly that which the petitioner has brought in. We cannot see how the relationship of the parties can improve after the conduct of respondent 1, including all the remarks written in the disputed minutes, by respondent 1;

(d) the substratum of the relationship of the parties have been so seriously eroded that there is no longer any basis for the petitioner to continue to hope for the situation to improve;

(e) this is a fit and proper case for the company to be wound up under s 465(1)(f) and (h) and we hereby grant an order in terms of prayers (a), (b) and (c) of the petition; and

(f) the order of the High court is set aside and we order costs of RM 15,000 to be paid by respondent 1 to the appellant subject to allocator.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali